

**BEFORE THE APPEALS BOARD  
FOR THE  
KANSAS DIVISION OF WORKERS COMPENSATION**

**LINDA L. VADEN**

Claimant

VS.

**FOCUS DEVELOPMENT CENTER**

Respondent

AND

**LIBERTY MUTUAL INSURANCE CO.**

Insurance Carrier

Docket No. 251,732

**ORDER**

Respondent appealed Administrative Law Judge Nelsonna P. Barnes' Award dated December 14, 2001. The Board heard oral argument on July 23, 2002.

**APPEARANCES**

Claimant appeared by her attorney, Robert R. Lee of Wichita, Kansas. Respondent and its insurance carrier appeared by their attorney, Anton C. Andersen of Kansas City, Kansas.

**RECORD AND STIPULATIONS**

The Board has considered the record and adopted the stipulations listed in the Award.

**ISSUES**

The Administrative Law Judge awarded claimant a 54 percent work disability based upon a 36.5 percent task loss and a 72 percent wage loss. The respondent requested review and raises the issue of the nature and extent of claimant's disability. Respondent argues claimant suffered only a scheduled disability to her right knee as a result of the

work-related injury on July 24, 1998. In the alternative, respondent argues that if claimant is entitled to a work disability the wage loss component of the work disability formula should be limited to 31 percent.

The claimant argues the Administrative Law Judge's Award should be affirmed.

#### **FINDINGS OF FACT AND CONCLUSIONS OF LAW**

Having reviewed the evidentiary record filed herein, the stipulations of the parties, and having considered the parties' briefs and oral arguments, the Board makes the following findings of fact and conclusions of law:

It is undisputed claimant suffered accidental injury arising out of and in the course of her employment on July 24, 1998. Claimant, Linda Louise Vaden, had worked for respondent for approximately 10 years. Claimant was employed as a certified nurse's aide, a certified medication aide, and a supervisor over the certified medication aides.

On July 24, 1998, claimant was restraining a client when the client dropped to the floor causing claimant to fall to the floor as well. Claimant testified both of her knees hit the floor but the right knee was more painful.

Claimant was treated by Bradley Bruner, M.D., and ultimately the doctor performed an arthroscopy chondroplasty of the patella and the lateral femoral condyle of claimant's right knee on January 27, 1999. Claimant's left knee began bothering her after the right knee had been injured and continued to bother her but the right knee remained more painful. Claimant testified as she continued to compensate for the right knee her left knee became more painful.

Claimant continued to work for respondent until approximately the end of March 1999 when respondent closed. After Dr. Bruner released the claimant, she found employment with the Presbyterian Manor earning \$6.50 an hour at 40 hours a week. Claimant resigned from her job with the Presbyterian Manor because that employer would not accommodate her restrictions. She then found employment with the Pizza Hut and was still working for them at the time of the regular hearing.

Initially, the respondent argues claimant suffered only a scheduled injury to her right knee. Respondent argues the medical records of Dr. Bruner, the treating physician, do not mention the left knee until an office visit of June 2000.

Claimant testified that after the accident her right knee was the most painful. As claimant received treatment directed at the right knee she began to develop pain in her left knee from favoring the right knee. Claimant testified she told Dr. Bruner about her left knee complaints before she had surgery on her right knee. Claimant testified she was

advised by Dr. Bruner that her left knee problems were the result of over compensating for the right knee.

The claimant was examined by Pedro A. Murati, M.D., on April 6, 2000, and described her left knee pain. Claimant gave Dr. Murati a history that Dr. Bruner had told her the left knee pain was caused by favoring her right knee. This record corroborates claimant's assertion that she had discussed her left knee complaints with Dr. Bruner even though his records do not record such complaints until later.

Dr. Bruner's medical records of June 20, 2000, contain the first mention of a complaint of left knee pain, but the record of that visit also contains the notation that the doctor believed the pain in claimant's left knee was a natural and probable consequence of compensating for the right knee.

Philip R. Mills, M.D., and Pedro A. Murati, M.D., both testified that as a result of the July 24, 1998, incident claimant suffered permanent impairment to both knees. Although Dr. Bruner initially did not rate claimant's left knee, he reviewed his medical records and, based upon the results of a bone scan, finally testified claimant had permanent impairment to both knees as a result of her work-related incident with respondent. Dr. Bruner concluded claimant's left knee injury was the natural and probable consequence of the right knee injury due to favoring the right knee.

The Board agrees with the Administrative Law Judge's determination that the medical opinions of all three doctors establish claimant suffered bilateral injuries to her lower extremities as a result of her July 24, 1998, work-related incident.

Dr. Mills opined, based on the AMA Guides, Fourth Edition, the claimant had a 10 percent impairment to each lower extremity for her valgus; 3 percent for the right lower extremity secondary to the atrophy; using the combined value charts, a 13 percent impairment to the right lower extremity and 10 percent to the left lower extremity. The doctor converted the lower extremity ratings to the body as a whole which resulted in a 5 percent impairment to the body as a whole secondary to her right knee and a 4 percent impairment to the body as a whole secondary to her left knee. Then using the Combined Values Chart, claimant would have a 9 percent permanent partial impairment to the body as a whole.

Based on the AMA Guides, Fourth Edition, Dr. Murati opined the claimant has a 10 percent impairment for crepitus of the right knee and a 7 percent impairment for mild lateral instability. The doctor combined these for a 16 percent impairment to the right knee. The doctor further opined claimant has a 5 percent impairment to the left lower extremity for the mild crepitus. The doctor converted the lower extremity ratings to the body as a whole which resulted in a 6 percent impairment to the body as a whole secondary to her right knee and a 2 percent impairment to the body as a whole secondary to her left knee. Then

using the Combined Values Chart, claimant would have an 8 percent permanent partial impairment to the body as a whole.

Dr. Bruner opined claimant has a 15 percent impairment to the right knee and a 1 or 2 percent impairment to the left knee. The lower extremity ratings would convert to a 6 percent impairment to the body as a whole secondary to her right knee and a 1 percent impairment to the body as a whole secondary to her left knee. Then Using the Combined Values Chart, claimant would have an 7 percent permanent partial impairment to the body as a whole.

The Board finds the doctors' opinions should be accorded equal weight and determines claimant has suffered an 8 percent permanent partial impairment of function to the body as a whole.

An injured worker is entitled to permanent partial general disability in excess of permanent functional impairment as long as the worker's post-injury wages are less than 90 percent of the worker's pre-injury wages.<sup>1</sup> The fact finder is required to decide whether or not claimant made a good faith effort to find appropriate employment after recovering from work-related injuries. If a finding is made that the worker did not make a good faith effort, the fact finder is required to determine an appropriate post-injury wage based upon claimant's ability rather than the difference in actual pre- and post-injury wages.<sup>2</sup>

Respondent argues claimant failed to make a good faith effort to find appropriate employment. Respondent argues claimant was not restricted to work less than 40 hours a week and she self limited her work at Pizza Hut to 20 to 25 hours a week. Accordingly, respondent urges the Board to impute a wage based upon a 40-hour work week. Respondent concludes the appropriate wage to impute would be \$6.50 for a 40 hour week which would result in a 31 percent wage loss.

The Board disagrees. It was claimant's uncontroverted testimony that she had to resign from her employment with Presbyterian Manor because that employer would not accommodate Dr. Bruner's restrictions. Claimant testified she then obtained the job with Pizza Hut because they were the only employer she contacted who would accommodate Dr. Bruner's restrictions. The Board concludes claimant's testimony establishes she made a good faith effort to obtain employment. This is not a situation where claimant self-limited the number of hours she would work, instead, claimant's uncontroverted testimony was she worked fewer hours because that was the only job she could obtain where the employer would accommodate her restrictions and those were the number of hours available to work.

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<sup>1</sup>See K.S.A. 44-510e(a).

<sup>2</sup>Copeland v. Johnson Group, Inc., 24 Kan. App.2d 306, 944 P.2d 179 (1997).

The Board affirms the Administrative Law Judge's implicit finding claimant made a good faith effort to find appropriate employment.

The Administrative Law Judge did not address the wage loss claimant incurred while she was employed at Presbyterian Manor. It is undisputed claimant earned \$6.50 an hour for a 40-hour work week. This computes to an average weekly wage of \$260 and results in a 31 percent wage loss. For the 4 months claimant was working for Presbyterian Manor her wage loss was 31 percent. Moreover, because claimant made a good faith effort to obtain appropriate employment within her restrictions she would be entitled to a 100 percent wage loss for those time periods when she was unemployed.

The Administrative Law Judge determined claimant suffered a 72 percent wage loss. This was based upon testimony from Jerry Hardin, the vocational consultant, that when he interviewed claimant she was making \$5.35 an hour and working 20 hours a week. This would result in a weekly wage of \$107 which computes to a 72 percent wage loss. However, claimant later testified she was earning \$5.15 an hour and working 20 to 25 hours a week at Pizza Hut. The Board finds claimant's direct testimony is more persuasive and concludes that her average weekly wage should be computed based upon that evidence. Such computation results in an average weekly wage of \$115.88. ( $\$5.15 \times 22.5 = \$115.88$ ) This average weekly wage results in a 69 percent wage loss. Accordingly, the Administrative Law Judge's decision is modified to reflect this recalculation of claimant's average weekly wage while employed at Pizza Hut.

The Administrative Law Judge averaged the opinions of the physicians and determined claimant suffered a 36.5 percent task loss. Neither party disputed this finding. Accordingly, the Board adopts and affirms the determination claimant suffered a 36.5 percent task loss.

Although the record is not clear, respondent apparently closed for business in March 1999. Claimant was employed by respondent until that time and was still receiving treatment from Dr. Bruner. She later asked Dr. Bruner to release her without restrictions so she could accept an employment offer from Presbyterian Manor. That release occurred on July 22, 1999. Claimant testified she worked for Presbyterian Manor for four months. Thereafter, claimant obtained employment with Pizza Hut in approximately August 2000. The award will be calculated based on these approximate dates as well as the dates of temporary total disability noted in the record.

Averaging claimant's 36.5 percent task loss with the 31 percent wage loss results in a 33.75 percent work disability for the time period claimant was working for Presbyterian Manor. Averaging claimant's 36.5 percent task loss with the 100 percent wage loss results in a 68.25 percent work disability for the time periods claimant was unemployed and seeking employment. Averaging claimant's 36.5 percent task loss with the 69 percent wage loss results in a 52.75 percent work disability for the time period commencing with claimant's employment with Pizza Hut.

Claimant continued to work for respondent while receiving treatment until she was taken off work by the doctor and began receiving temporary total disability compensation on November 24, 1998. It appears she earned a comparable wage during that time period or at least 90 percent of her average weekly wage. Accordingly, claimant's permanent partial general disability is based upon the 8 percent whole body functional impairment for those weeks that claimant is entitled to receive permanent partial disability benefits following the date of accident through November 23, 1998.

Claimant received temporary total disability compensation from November 24, 1998, until March 16, 1999. Dr. Bruner removed his restrictions on July 22, 1999, so that claimant could accept employment with Presbyterian Manor. Accordingly, for the time period from March 17, 1999 through July 21, 1999, claimant was unemployed and because claimant made a good faith effort to find appropriate employment she has a 100 percent wage loss for that period. Averaging a 100 percent wage loss with a 36.5 percent task loss creates a 68.25 percent work disability for the period from March 17, 1999, through July 21, 1999.

Claimant worked for Presbyterian Manor from approximately July 22, 1999, through approximately November 22, 1999, a period of four months. Claimant earned \$260 per week. Comparing the \$260 to claimant's pre-injury wage of \$378.02, claimant had a 31 percent wage loss for that period of time. Averaging the 31 percent wage loss with his 36.5 percent task loss creates a 33.75 percent work disability for the period from July 22, 1999, through November 22, 1999.

Claimant was unemployed from November 23, 1999, until she obtained employment with Pizza Hut in approximately August 2000. Because claimant made a good faith effort to find employment she is entitled to a 100 percent wage loss for that time period. Averaging a 100 percent wage loss with a 36.5 percent task loss creates a 68.25 percent work disability for the time period from November 23, 1999, through July 31, 2000.

In approximately August 2000, claimant found the job with Pizza Hut where she earned \$5.15 an hour and worked 20-25 hours per week. At that point, claimant's post-injury wage decreased to \$115.88 per week. Accordingly, for the period from August 1, 2000, claimant's wage loss was 69 percent. Averaging the 69 percent wage loss with the 36.5 percent task loss establishes a 52.75 percent work disability.

Accordingly, claimant has an 8 percent permanent partial general disability through November 23, 1998; followed by temporary total disability through March 16, 1999; followed by a 68.25 percent permanent partial general disability through July 21, 1999; followed by a 33.75 percent permanent partial general disability through November 22, 1999; followed by a 68.25 percent permanent partial general disability through July 31, 2000; followed by a 52.75 percent permanent partial general disability.

**AWARD**

**WHEREFORE**, it is the finding, decision and order of the Board that the Award of Administrative Law Judge Nelsonna P. Barnes dated December 14, 2001, is modified as follows:

Claimant is granted compensation from respondent for a July 24, 1998, accident and resulting disability. Based upon an average weekly wage of \$378.02, claimant is entitled to receive 16.14 weeks of temporary total disability benefits at \$252.03 per week, or \$4,067.76.

For the period from the date of accident through November 23, 1998, claimant is entitled to receive 17.57 weeks of permanent disability benefits at \$252.03 per week, or \$4,428.17, for an 8 percent permanent partial general disability.

For the period from March 17, 1999, through July 21, 1999, claimant is entitled to receive 18.14 weeks of permanent disability benefits at \$252.03 per week, or \$4,571.82, for a 68.25 percent permanent partial general disability.

For the period from July 22, 1999, through November 22, 1999, claimant is entitled to receive 17.71 weeks of permanent disability benefits at \$252.03 per week, or \$4,463.45, for a 33.75 percent permanent partial general disability.

For the period from November 23, 1999, through July 31, 2000, claimant is entitled to receive 36 weeks of permanent disability benefits at \$252.03 per week, or \$9,073.08, for a 68.25 percent permanent partial general disability.

Thereinafter, beginning August 1, 2000, claimant is entitled to a 52.75 percent permanent partial disability resulting in an additional 112.75 weeks of permanent partial disability compensation at the rate of \$252.03 per week totaling \$28,416.38 for a total award of \$55,020.66.

As of August 29, 2002, there would be due and owing to the claimant 16.14 weeks of temporary total disability compensation at the rate of \$252.03 per week or \$4,067.76 plus 17.57 weeks of permanent disability benefits at the rate of \$252.03 per week or \$4,428.17 for an 8 percent permanent partial general disability plus 18.14 weeks of compensation at \$252.03 per week or \$4,571.82 for a 68.25 percent permanent partial general disability plus 17.71 weeks of compensation at \$252.03 per week or \$4,463.45 for a 33.75 percent permanent partial general disability plus 36 weeks of compensation at \$252.03 per week or \$9,073.08 for a 68.25 percent permanent partial general disability plus 108.43 weeks of compensation at \$252.03 per week or \$27,327.61 for a total due and owing of \$53,931.89 less amounts previously paid. Thereafter, the remaining balance in the amount of \$1,088.77 shall be paid at \$252.03 per week for 4.32 weeks until further order of the Director.

**IT IS SO ORDERED.**

Dated this \_\_\_\_\_ day of August 2002.

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BOARD MEMBER

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BOARD MEMBER

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BOARD MEMBER

c: Robert R. Lee, Attorney for Claimant  
Anton C. Andersen, Attorney for Respondent  
Nelsonna P. Barnes, Administrative Law Judge  
Director, Division of Workers Compensation